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No. 09-493

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRANK C. MINVIELLE, LLC,

Petitioner,

v.

ATLANTIC REFINING COMPANY, OXY U.S.A. INC., PACIFIC ENTERPRISES OIL CO. (USA), AND MOSAIC GLOBAL OPERATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a court issues a final judgment of dismissal based on the plaintiff's lack of standing, and plaintiff re-files suit based on the same transaction or occurrence, does the application of well-established *res judicata* principles preventing the plaintiff from relitigating the issue of standing present an issue worthy of review by this Court?

2. Does a lower appellate court's application of Supreme Court precedent finding that it has ancillary jurisdiction to protect the integrity of a prior judgment present an issue worthy of review by this Court?[1]

3. Does a lower appellate court's refusal to consider a *Burford* abstention argument that was untimely and inapplicable to a case in which the only question presented was the *res judicata* effect of a prior final judgment present an issue worthy of review by this Court?

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1. Petitioner, Frank C. Minvielle, LLC's Second and Third Questions Presented address the same or similar issues, and as such, Respondents have combined these Questions Presented.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Atlantic Refining Company was a corporate predecessor to Atlantic Richfield Company. Atlantic Richfield Company is wholly owned by BP America Inc., whose parent company is BP plc, a publicly traded company.

Respondent, Pacific Enterprises Oil Company (USA) is wholly owned by Pacific Enterprises Oil Company, which is wholly owned by Sempra Generation, which is wholly owned by Sempra Energy, a publicly traded company.

Respondent, OXY USA Inc. is a wholly-owned indirect subsidiary of Occidental Petroleum Corporation, a publicly traded corporation. Occidental Petroleum Corporation has no parent, nor is there any publicly held company that holds a 10% or larger interest in Occidental Petroleum Corporation.

Respondent, Mosaic Global Operations, Inc.'s parent company is Mosaic Global Holdings, Inc. Mosaic Global Holdings, Inc.'s parent company is The Mosaic Company. One-third of The Mosaic Company's stock is publicly traded, and the remainder is owned by Cargill, Inc. No publicly held company, other than Cargill, Inc. owns 10% or more of the stock of The Mosaic Company.

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STATEMENT OF THE CASE

I. Clarification of Misstatements in Petitioner's Statement of the Case.

The Petitioner, Frank C. Minvielle, LLC ("Minvielle"), misstates many of the underlying facts in this case. When the true facts are properly considered, there are no issues worthy of Certiorari by this Court. As a result, Respondents hereby discharge their obligation under Supreme Court Rule 15.2 to correct the record. Specifically, Minvielle misstates or omits the following key facts:

- Minvielle omits the fact that the 1961 Lease that the Respondents operated under expired in 1977, more than 20 years before Minvielle acquired ownership in the property, and 11 years before Minvielle's predecessors had acquired their ownership.

- Minvielle states that during the pendency of *Minvielle I*, its predecessors in title, the Cowans, agreed to obtain the "required" assignment. However, the document that was ultimately executed was not an assignment of a new right, but rather was acknowledged as only a "clarification" of the parties' original intent in the Act of Cash Sale.

- Minvielle asserts that *Minvielle I* was dismissed without prejudice. *Minvielle I*, however, was a dismissal on summary judgment that was not appealed. As a result, it became a valid and final judgment.

- Minvielle asserts repeatedly that *Minvielle II* was dismissed for lack of standing. However, both the Fifth Circuit and the District Court dismissed the case on *res judicata* grounds and refused to consider standing.

- Although Minvielle puts great emphasis on the alleged fact that it is now bringing the Cowans' claims, the reality is that Minvielle filed *Minvielle II* based on exactly the same rights that it claimed to have in *Minvielle I*.

II. Respondents' Statement of the Case.

A. The Parties.

This suit is Minvielle's second attempt to bring the same claim for alleged environmental contamination to land that it purchased in 1998. The property at issue was the subject of a 1961 Oil, Gas and Mineral Lease, between a prior owner of the property, Juliet Bourgeois Delcambre, and Respondent, The Atlantic Refining Company ("ARCO"). In 1962, ARCO assigned the Lease to Callery Properties, Inc., which, in 1974, assigned an interest in it to Mosaic's predecessor, Petro-Lewis Corporation ("Petro-Lewis"). During the term of the Lease, Respondents, OXY USA Inc. and Pacific Enterprises Oil Company (USA), or their predecessors, also shared a working interest in the Lease pursuant to an Operating Agreement. Notably, the Lease expired in 1977 after production ceased from the one well drilled pursuant to the Lease.

In 1988, eleven years after operations were completed and the Lease had expired, Ms. Delcambre passed away and the property passed to Ms. Delcambre's daughter and grandchildren (the "Cowans"). The Cowans sold their interest in the property to Minvielle's predecessor by name change through an Act of Cash Sale dated August 27, 1998.

B. *Minvielle I.*

Minvielle first filed suit in 2003 in the 16th Judicial District Court for the Parish of Iberia, State of Louisiana against Respondent Mosaic Global Operations, Inc.'s predecessor, IMC Global Operations, Inc. ("IMC"), raising numerous claims generally relating to allegations of environmental damage arising out of the oil and gas operations on the property. IMC removed *Minvielle I* to the Western District of Louisiana and moved to dismiss it on several grounds, including the ground that Minvielle lacked standing, or was not the "real party in interest," because Minvielle had purchased the property years after the oil and gas operations had ceased, and because the act of transfer did not transfer the right to sue for pre-acquisition damages to the land. The court converted IMC's motion into a motion for summary judgment. In a Memorandum Opinion dated October 19, 2004, the court granted the motion for summary judgment and held that Minvielle lacked standing to assert pre-acquisition claims against IMC. *Frank C. Minvielle, LLC v. IMC Global Operations, Inc., et al.*, No. 03-1908 (W.D. La. 10/19/04) (hereinafter "*Minvielle I*"), Pet. App. 93, 97.

The *Minvielle I* decision was based on the finding that the Act of Cash Sale did not include a specific assignment of rights that would enable Minvielle to recover from third parties for damage done to the property prior to the sale. *Id.* at Pet. App. 93.

In Minvielle's Statement of the Case, it incorrectly states that *Minvielle I* was dismissed without prejudice. Nowhere in the *Minvielle I* Judgment does the court dismiss the case without prejudice. The claims were clearly dismissed in their entirety based on the granting of a motion for summary judgment, and as such, were dismissed with prejudice.

Following this dismissal, Minvielle moved for reconsideration or a new trial, arguing that the parties to the Act of Cash Sale intended to assign litigation rights to Minvielle, and asserting that the Act of Cash Sale "will be amended to so state." The court rejected Minvielle's argument, noting that no such amendment had been introduced, and questioning whether such an amendment would even be permitted by a court. Pet. App. 59. In denying reconsideration or a new trial, the *Minvielle I* court reiterated its previous finding that the "plaintiff does not have standing to bring contractual or tort claims." *Id.* Minvielle did not appeal the Judgment. Accordingly, on February 12, 2005, after the expiration of the 30-day delay following the court's denial of Minvielle's motion for reconsideration or new trial, the Judgment became final and nonappealable.

C. The "Amendment" to the Act of Cash Sale.

Following the dismissal of *Minvielle I*, Minvielle executed the "Amendment" that it had presented to the court in draft form in that case. That document, which only clarified the parties' intent regarding the Act of Cash Sale, states:

> Sellers and each of them declared further that *they did by virtue of the Act of Cash Sale* . . . sell, transfer and deliver . . . all of their right, title, claim, interest and demand . . . including claims for damages suffered by the aforedescribed tracts of land prior to September 18, 1998.

(Emphasis added). Notably, no "new" rights were transferred in this document. Indeed, as discussed below, the Fifth Circuit in *Minvielle II* found that the document "by its terms did not convey new rights" and that Minvielle's counsel had acknowledged that the Amendment "was merely an 'act of correction' and 'clarification.'" *Frank C. Minvielle, LLC v. Atlantic Refining Co., et al.*, No. 08-30399 (5th Cir. 7/24/2009) (hereinafter "Fifth Circuit Opinion"), Pet. App. 7.

D. *Minvielle II*.

Following the dismissal of *Minvielle I*, Minvielle filed the instant suit ("*Minvielle II*") in the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, asserting the very same claims against Mosaic, as well as against Respondents, OXY USA Inc., ARCO, and Pacific Enterprises Oil Company (USA).

Minvielle admitted in its *Minvielle II* Petition that *Minvielle I* raised claims "**identical to those brought herewith.**"

Minvielle incorrectly claims that it can now bring this action notwithstanding the final judgment in *Minvielle I*, because the Amendment to the Act of Cash Sale provides it with the Cowans' right to sue for damages. However, as discussed above, the Amendment did not assign any new rights, but merely purported to clarify what was intended to have been assigned in 1998 via the Act of Cash Sale. Thus, the rights that Minvielle asserted it had in *Minvielle I* are exactly the same rights that it now argues it has in *Minvielle II*.

Mosaic, with the consent of all defendants, removed this case to the Western District of Louisiana, and subsequently filed a Motion to Dismiss based on *res judicata*. The other defendants likewise filed similar motions, all of which were converted into motions for summary judgment by the District Court. Mosaic argued that the final, nonappealable judgment of the District Court in *Minvielle I* barred Minvielle's second attempt to relitigate the same cause of action.

Contrary to Minvielle's assertion in its Statement of the Case, *Minvielle II* was dismissed based on *res judicata* grounds, and not for lack of subject matter jurisdiction.[2] On September 6, 2007, the District Court

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[2] The District Court Opinion in *Minvielle II* contains no analysis of standing or subject matter jurisdiction. Nonetheless, the Opinion goes on to say: "Because the *Minvielle I* finding that plaintiff did not have standing has *res judicata* effect, the court in the instant case does not have subject matter

(Cont'd)

granted Respondents' motions for summary judgment and held that the *Minvielle I* judgment of dismissal for lack of standing was a valid and final determination from a case arising out of the same transaction or occurrence. *Frank C. Minvielle, LLC v. Atlantic Refining Co., et al.*, No. 05-1312 (W.D. La. 9/6/2007) (hereinafter "*Minvielle II*") Pet. App. 35. The court further found that the identity of parties element of *res judicata* was satisfied because the parties shared the same "quality" based on the fact that they were all former parties to, or successors-in-interest to, the 1961 Lease that covered the property. Pet. App. 32-33. The court dismissed the case in its entirety.

Following the dismissal, Minvielle filed a Motion for New Trial and/or Motion to Amend Judgment. It attacked the District Court's judgment solely on the issue of identity of the parties, and attempted to assert for a third time that it had standing to bring the suit against Respondent, ARCO. On March 24, 2008, the court denied Minvielle's Motions. The court rejected Minvielle's attempted third bite at the apple regarding standing.

Although Minvielle repeatedly claims that *Minvielle II* was dismissed due to lack of standing, this is simply

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(Cont'd)

jurisdiction." *Minvielle II*, Pet. Ap. 48. Nowhere in the Opinion does the court address the question of whether it had subject matter jurisdiction except in this concluding statement. The Fifth Circuit expressly disregarded this statement as "erroneous and unnecessary dicta." Fifth Circuit Opinion, Pet. App. 6-7, n.3.

not true. The court in *Minvielle II* framed the issue presented as "whether *res judicata* applies to this court's previous ruling that plaintiff lacks standing." Pet. App. 26. Following this, the court analyzed the requirements of *res judicata*, and concluded that "this court's jurisdictional ruling in Minvielle I is a final and valid judgment to which *res judicata* applies." Pet. App. 32. Thus, the *Minvielle II* court expressly refused to determine whether Minvielle had standing because it was barred by the *res judicata* effect of *Minvielle I*.

E. The Fifth Circuit's Holding.

Minvielle appealed the District Court's granting of summary judgment, again focusing on the standing issue rather than facing the true issue of *res judicata*. The Fifth Circuit, however, did not fall for the misleading attempt to relitigate standing. It recognized:

> Notwithstanding Minvielle's attempt to frame the issue below as a question of standing, the issue was simply one of res judicata—whether the court's *Minvielle I* decision precluded Minvielle from arguing that it has standing to sue for the alleged environmental damages in *Minvielle II*.

Fifth Circuit Opinion, Pet. App. 9. Before addressing the issue of *res judicata*, the Fifth Circuit chose to address the issue that Minvielle's counsel brought up for the first time in oral argument: whether it had subject matter jurisdiction. After oral argument, the Fifth Circuit ordered supplemental briefing on the subject matter jurisdiction issue. Ultimately, the Fifth

Circuit concluded that it had jurisdiction to determine its own jurisdiction. *Id.* at 8-9. Further, the court found that it also had ancillary jurisdiction to preserve the effect of a prior judgment. *Id.* at 9. Finally, the Fifth Circuit determined that Minvielle's *Burford* abstention argument, which it improperly raised in the supplemental briefing that was to address subject matter jurisdiction and nothing more, was untimely and inapplicable. *Id.* at 10, n. 4.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's application of *res judicata* to prevent the relitigation of standing, which was fully and finally decided in a previous case, does not present a compelling reason to invoke discretionary review by this Court.

Minvielle has not presented any compelling reasons as envisioned in Supreme Court Rule 10 to persuade this Court to exercise its discretionary review. The Fifth Circuit based its decision that Minvielle was barred from rearguing standing on the long-standing doctrine of *res judicata*. Minvielle has not identified any federal appellate court or state court decision genuinely in conflict with the Fifth Circuit's decision in this case, has not shown that the Fifth Circuit departed from the accepted and usual course of judicial proceedings, and has not identified any important, unsettled issue of federal law that this Court should decide. For the reasons explained in more detail below, the Petition should be denied.

A. Minvielle's disagreement with the Fifth Circuit's factual findings is not a compelling reason for this Court to exercise its discretion.

The keystone of Minvielle's arguments is the incorrect assertion that the Amendment to the Act of Cash Sale conveyed some "new" right to Minvielle that now allows it to circumvent the ruling of the court in *Minvielle I* and avoid the preclusive effect of *res judicata*. This notion, however, defies the facts as found in the decisions below. The Fifth Circuit expressly stated:

> Notably, the alleged amendment, by its very terms, did not amend the Act of Cash Sale or confer any new rights upon Minvielle; rather, as Minvielle acknowledged, it purported only to clarify the original intentions of the parties to the agreement.

Fifth Circuit Opinion, Pet. App. 6.[3] Further, this argument fails to appreciate that the only issue before the District Court and the Fifth Circuit in *Minvielle II* was the *res judicata* effect of a prior final judgment, which bars Minvielle's second attempt at arguing that

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[3] It is no mystery why Minvielle argued below that the Amendment did not alter the terms of the original Act of Cash Sale, but merely clarified the intent of the parties. Under Louisiana law, "the right to damages conferred by a lease is a personal right that must be specifically assigned *at the time of sale*." *Lejuene Bros., Inc. v. Goodrich Petroleum, LLC*, 981 So.2d 23, 31 (La. App. 3 Cir. 2007), *writ denied*, 978 So.2d 327 (La. 4/4/08) (emphasis added).

it has standing, an issue that was fully and finally litigated in *Minvielle I*.

Notably lacking in Minvielle's petition is any meaningful discussion of the elements of *res judicata*, the actual issue before this Court. Indeed, Minvielle's attempts to misdirect this Court, as it unsuccessfully attempted to do in the District Court and the Fifth Circuit, focuses on whether the Act of Cash Sale and the Amendment thereto conferred standing and whether the District Court and Fifth Circuit properly applied the law of standing. But the issues of standing, the Act of Cash Sale, and Amendment were fully and finally litigated in *Minvielle I*. The only proper and real issue here is *res judicata*. Minvielle chose not to appeal the final ruling in *Minvielle I* and filed a second lawsuit instead. Consequently, it must now face the consequences of *res judicata*.

B. Minvielle's claim that this Court has not previously held that *res judicata* applies to jurisdictional determinations is inaccurate, and the Fifth Circuit's application of *res judicata* was the correct result.

In its Petition, Minvielle understandably chose not to acknowledge the actual holdings of the courts below because they are legally sound and correct, and presented no compelling reason for this Court to exercise its discretionary review. In fact, the only time Minvielle mentions *res judicata* is when it argues that the Fifth Circuit's factual finding that Minvielle did not acquire any new rights pursuant to the Amendment to the Act of Cash Sale was incorrect. But *res judicata*

clearly applies to jurisdictional determinations and it prevents Minvielle from rearguing standing.

A federal court sitting in diversity uses federal common law to determine the effect of a prior federal court decision. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001). Federal common law directs a court to apply the law that would be applied in the state where the federal court sits. *Id.* Applying Louisiana law, the effect of a prior federal court decision is determined by federal *res judicata* principles. *See Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, 95-0671 (La. 1/16/96), 666 So.2d 624, 632-33; *Bobby and Ray Williams P'ship, LLP v. Shreveport Louisiana Hayride Co., LLC*, 38,866 (La. App. 2 Cir. 9/22/04), 882 So.2d 676, 678, *writ denied*, 04-2636 (La. 12/17/04), 888 So.2d 875; *Pilie & Pilie v. Metz*, 547 So.2d 1305, 1308-09 (La. 1989).

Under federal law, *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005), *cert. denied*, 547 U.S. 1055 (2006) (citing *Petro-Hunt, LLC v. United States*, 365 F.3d 385, 395 (5th Cir. 2004)). Each element was satisfied in *Minvielle II* and is discussed below.

1. Identity of the Parties.

The first element that courts discuss in applying *res judicata* is the identity of the parties, or whether the parties in the first suit are in privity with the parties in the second suit. With regard to identity of the parties, this Court recently held:

> [N]onparty preclusion may be justified based on a variety of pre-existing 'substantive legal relationship[s]' between the person to be bound and a party to the judgment. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor.

Taylor v. Sturgell, 128 S.Ct. 2161, 2172 (2008) (internal citations omitted). In this case, there is no dispute that Respondent, Mosaic, is the same party in both *Minvielle I* and *Minvielle II*, and as a result, *res judicata* obviously applies to Mosaic. Further, Mosaic adequately represented all of the Respondents' interests in *Minvielle I* and *res judicata* applies to all of the Respondents. First, all of the Respondents are connected through the Lease under which Minvielle asserted its claims. Each of the Respondents was a lessee under the Lease and subject to an Operating Agreement through which each party shared the costs and benefits in the Lease. Indeed, Minvielle now sues all Respondents for the same alleged damages under the same Lease and Operating Agreement. Thus, privity exists because, as the Fifth Circuit and District Court found, the non-parties were all successors-in-interest or former parties to the Lease. Fifth Circuit Opinion, Pet. App. 14-15.

Second, all of Minvielle's claims are based on the same conduct on the property subject to the Lease, and Mosaic adequately represented all of the Respondents' interests in *Minvielle I*. *See Thomason v. United Gas Public Service Co., et al.*, 20 F.Supp. 598, 599 (W.D. La. 1937) (In a case involving a suit based on a mineral lease, court dismissed claim and held that "[j]udgments affecting rights in and to real estate are binding both upon parties and their privies."). As a result, the Fifth Circuit and District Court correctly found that privity satisfied this element of *res judicata*.

2. Court of Competent Jurisdiction.

The second element of *res judicata*, that the prior decision be rendered by a court of competent jurisdiction, is clearly met. Minvielle does not challenge the fact that *Minvielle I* was dismissed by the Western District of Louisiana, following its removal from the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, and that jurisdiction in the Western District of Louisiana was proper under diversity of citizenship. Although Minvielle now seeks to collaterally attack the jurisdiction of the Federal District Court in *Minvielle I*, as discussed below, both the *Minvielle I* and *Minvielle II* courts had subject matter jurisdiction to render the judgments that they did.

3. Final Judgment on the Merits.

The third element of *res judicata*, a final judgment on the merits, is also clearly satisfied in this case. It is well established that *res judicata* applies to prior

jurisdictional determinations. *See, e.g., Ins. Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195, 2205-06 (2009). The *Minvielle I* decision was a dismissal of the case on summary judgment, which is a judgment on the merits and has the same effect as if the case had been tried by the party against whom the judgment is rendered and decided. *See, e.g., Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 471 (5th Cir. 1998), *cert. denied*, 526 U.S. 1005 (1999), *quoting, Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir 1985). Once Minvielle chose not to appeal the Judgment in *Minvielle I*, it became final.

Moreover, as both the Fifth Circuit and District Court held, a dismissal based upon a lack of standing is a final jurisdictional determination and thus precludes relitigation of the same issue in a subsequent lawsuit. The Fifth Circuit found that "although a jurisdictional ruling is technically not an adjudication on the merits, '[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal.'" Fifth Circuit Opinion, Pet. App. 8, quoting *Ins. Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

This Court recently reaffirmed this principle in *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195, 2205-06 (2009). In *Bailey*, this Court highlighted the importance of finality and the rules of *res judicata*: "[i]f the law were otherwise, and 'courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of res judicata . . . would be entirely short-circuited.'" *Id.*

Additionally, the Fifth Circuit's holding is entirely consistent with its prior decisions and the decisions of the other Circuits. *See, e.g., Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) (A dismissal adjudicating the court's jurisdiction prevents a second complaint from commanding "a second consideration of the same jurisdictional claims."); *United States v. 129.97 Acres of Land*, 118 Fed.Appx. 407, 409 (10th Cir. 2004) (*res judicata* applies to prior determination that party had no ownership interest in the subject property and therefore **lacked standing** to participate in any litigation concerning it); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000), *citing Magnus Electronics, Inc. v. La Republica Argentina*, 830 F.2d 1396, 1400 (7th Cir. 1987) ("A dismissal for lack of jurisdiction precludes relitigation of the issue actually decided, namely the jurisdictional issue.").

In this case, Minvielle attempts to relitigate the standing issue by contending that the Amendment to the Act of Cash Sale now gives it a right it did not previously have. However, as the Amendment merely aims to clarify the parties' original intentions, it is not a *new* fact at all, but merely a clarification of an old one. As such, it is little more than an attempt to relitigate an issue – whether the 1998 Act of Cash Sale gave Minvielle standing to sue for pre-acquisition damages – that was exhaustively analyzed and conclusively determined in *Minvielle I*. Simply put, the Amendment adds nothing that justifies revisiting the same issue. As a result, this element of the *res judicata* is also clearly met.

4. Same Claim or Cause of Action.

Finally, the fourth element of *res judicata*, whether the two cases arise out of the same claim or cause of action, is also clearly met. Importantly, Minvielle admitted in its Petition in *Minvielle II* that the claims brought in *Minvielle I* were "identical to those brought herewith." Further, the causes of action asserted arise from the defendants' alleged torts and contractual violations of the Lease, and were the same in both *Minvielle I* and *Minvielle II*. The clear identity of these operative facts is more than sufficient to satisfy this requirement of *res judicata*.

C. The Fifth Circuit's Opinion does not conflict with the Seventh Circuit's holding in *Perry v. Globe Auto Recycling, Inc.*

Minvielle portrays a conflict in circuit decisions where one does not exist. Minvielle claims that the Seventh Circuit's decision in *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (7th Cir. 2000), conflicts with the Fifth Circuit's decision below; however, the facts of the two cases are easily distinguishable.

In *Globe Auto Recycling, Inc.*, the plaintiff had previously and unsuccessfully sued a towing company and a municipality after his car was towed. Following the dismissal, the plaintiff then purchased the separate and distinct claims of another individual whose car had been towed, and brought those claims as an assignee. The District Court dismissed these claims based upon *res judicata*, but the Seventh Circuit reversed. *Globe Auto Recycling, Inc.*, 227 F.3d at 952.

Minvielle's reliance on *Globe Auto Recycling, Inc.* is misplaced because the Seventh Circuit's decision was predicated on the fact that even though the plaintiff had brought similar claims previously and lost, ***the assignor's interest was never represented in the prior litigation***. Therefore, the assignor's claims were not subject to the preclusive effects of the prior judgment. *Id.* at 953. Thus, in the second lawsuit, there was nothing close to an identity of parties with the previous lawsuit, as the plaintiff was not representing his own rights, but those of the assignor, involving a totally different set of facts. *Id.* Moreover, the claims asserted in the first suit were separate and distinct from the claims asserted in the second suit.

In this case, however, there is a clear identity of parties in the two suits. Minvielle now claims that in *Minvielle I*, it was litigating its own rights, which the court found did not include pre-acquisition damages claims, and that now, in *Minvielle II*, it is litigating the Cowans' rights, which were allegedly acquired via the Amendment to the Act of Cash Sale. This argument defies logic because in *Minvielle I*, Minvielle also asserted that it was suing on rights it had acquired from the Cowans. Thus, Minvielle has always claimed that it was bringing suit based on rights it had acquired from the Cowans.

Further, the Fifth Circuit expressly found (and indeed Minvielle acknowledged) that the Amendment only clarified the interests that were conveyed in the Act of Cash Sale, and did not convey any new right. Thus, the interests purportedly acquired by Minvielle by the Amendment (i.e., the predecessor's interests that

were transferred via the Act of Cash Sale) were in fact previously litigated in the *Minvielle I*.

Unlike *Globe Auto Recycling, Inc.*, in which the two suits involved separate parties, separate property (two separate automobiles), separate incidents (two separate towing actions), separate and distinct claims, and separate asserted rights, *Minvielle II* involves the same parties, the same property, the same incident (the alleged contamination), and the same asserted rights as those that were present in the *Minvielle I*. There is a clear identity of parties between *Minvielle I* and *Minvielle II*, and therefore *Globe Auto Recycling, Inc.* is easily distinguishable. The Fifth Circuit's decision herein does not conflict with the Seventh Circuit's decision.

II. The Fifth Circuit's application of Supreme Court precedent relating to ancillary jurisdiction does not present an issue worthy of Certiorari.

In connection with its ancillary jurisdiction argument, Minvielle once again relies on its incorrect factual statement, that it purportedly obtained new rights with the Amendment to the Act of Cash Sale. However, as the Fifth Circuit and District Court both found, the Amendment only clarified the intent of the parties, and the effect of the Amendment was litigated in *Minvielle I*. Once again, Minvielle's writ should not be granted on "facts" that are not stated correctly. Nor should they contradict Minvielle's prior position that the Amendment was merely a clarification.

During oral argument before the Fifth Circuit, Minvielle argued for the first time that the District Court, in both *Minvielle I* and *Minvielle II*, lacked subject matter jurisdiction. The Fifth Circuit requested supplemental briefing on this limited issue. Minvielle now argues that the District Court could not have subject matter jurisdiction because *res judicata* does not apply to the ruling in *Minvielle I* because it now has standing. The Fifth Circuit, however, expressly rejected Minvielle's attempt to relitigate standing:

> Notwithstanding Minvielle's attempt to frame the issue below as a question of standing, the issue was simply one of res judicata—whether the court's *Minvielle I* decision precluded Minvielle from arguing that it has standing to sue for the alleged environmental damages in *Minvielle II*. The question of standing is precisely the question that *Minvielle I* addressed, and there have been no changed circumstances that would warrant bypassing the bar of res judicata.

Fifth Circuit Opinion, Pet. App. 9. Notwithstanding Minvielle's last minute arguments to the contrary, the Fifth Circuit had original subject matter jurisdiction to hear *Minvielle II*. Jurisdiction was predicated on 28 U.S.C. § 1441 in that the parties are diverse and the action was properly removed from the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, to the United States District Court for the Western District of Louisiana. Original Jurisdiction has not been challenged here.

Further, the Fifth Circuit correctly found that the District Court had ancillary jurisdiction to protect its prior judgment. Upon Respondents' filing of dispositive motions based on *res judicata*, the District Court acquired ancillary jurisdiction. *Southmark Properties, et al. v. The Charles House Corporation, et al.*, 742 F.2d 862, 868 (5th Cir. 1984), *quoting Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("It is well settled . . . that a district court possesses ancillary jurisdiction 'to secure or preserve the fruits and advantages of a judgment or decree rendered' by that court."). The source of the District Court's ancillary jurisdiction is its unchallenged subject matter jurisdiction in *Minvielle I*. *See Southwest Airlines Company v. Texas International Airlines, Inc., et al.* 546 F.2d 84, 89-90 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977), *citing Dugas v. American Surety Co.*, 300 U.S. 414 (1937) (holding that action by federal district court to effectuate a prior decree "would be considered, for jurisdictional purposes, as supplemental or ancillary to the prior federal litigation, over which the district court properly asserted jurisdiction").

This Court recently reaffirmed this principle in *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009). In *Bailey*, a bankruptcy order from 1986 enjoined certain claims against Travelers Indemnity Company following a settlement. *Id.* at 2201. In 2002, Travelers, which was facing several suits, requested that the bankruptcy court enjoin these suits based upon this 1986 Order. One of the arguments the plaintiffs raised was that the bankruptcy court that issued the 1986 Order did not have the ability to expand its subject matter jurisdiction and issue the broad Order enjoining them

from filing suit. This Court, however, rejected this argument, holding "'[e]ven subject-matter jurisdiction . . . may not be attacked collaterally." *Id.* at 2205, quoting *Kontrick v. Ryan*, 540 U.S. 443, 455, n. 9 (2004). The Court further noted the importance of finality of judgments, holding that "[i]f the law were otherwise, and 'courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of res judicata . . . would be entirely short-circuited." *Id.* at 2206, quoting *In re: Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir. 2005).

Further, the assertion of ancillary jurisdiction is appropriate where the potential effect of a lawsuit would "effectively nullify" a judgment of that court in a prior action. *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992). Ancillary jurisdiction can also be asserted even when subject matter jurisdiction in the instant matter has been challenged. *Id.*, citing *Southmark Properties*, 742 F.2d at 868 ("[Ancillary jurisdiction is appropriate] even where the federal district court would not have jurisdiction over the second action if it had been brought as an original action.").

Here, there is no doubt that allowing the claims asserted in *Minvielle II* to proceed would "effectively nullify" the *Minvielle I* court's judgment that Minvielle did not have standing to assert such claims. By determining that the claims are barred by *res judicata*, the District Court in *Minvielle II* acted to protect its earlier judgment in *Minvielle I*. In so doing, the Court may rely on its ancillary jurisdiction, regardless of whether subject matter jurisdiction in *Minvielle II* is

challenged. Thus, the "fruits and advantages" of *Minvielle I* must be protected, and the *Minvielle II* courts correctly exercised ancillary jurisdiction to do so.

III. The Fifth Circuit's refusal to consider a *Burford* abstention doctrine argument that was untimely and inapplicable to a case in which the only question presented is the *res judicata* effect of a prior final judgment does not present an issue worthy of this Court's review.

Minvielle's *Burford* abstention doctrine assertion was not properly preserved below, and as a result, is not properly before this Court for review. During oral argument at the Fifth Circuit, Minvielle, for the first time, raised the question of whether the District Court had *subject matter jurisdiction*, which can be raised for the first time on appeal. The Fifth Circuit allowed the parties 10 days to submit supplemental briefing on the issue of *subject matter jurisdiction*. In Minvielle's supplemental brief, however, Minvielle raised a completely new issue (*i.e. Burford* abstention doctrine), which was improper and untimely. As a result, Minvielle waived this argument below. *See Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 179 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (refusing to consider issue that was not raised or adequately briefed in parties' opening briefs); *Atwood v. Union Carbide Corp.*, 847 F.2d 278, 280 (5th Cir. 1988), *amended on reh'g on other grounds*, 850 F.2d 1093 (5th Cir. 1988) ("As we have already noted, issues not briefed, or set forth in the list of issues presented, are waived.").

Further, even if this issue was properly before the Fifth Circuit (which is denied), the refusal to apply the *Burford* abstention doctrine does not present an issue worthy of this Court's discretionary review. The *Burford* abstention doctrine "stands as a narrow exception to the rule that federal courts 'have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.'" *Holden v. Connex-Metalina Management Consulting GMBH, Etc. et al.*, 302 F.3d 358, 363 (5th Cir. 2002), *citing Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). "Abdication of the obligation to decide cases can be justified under [the abstention doctrine] only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Colorado River Water Conservation District, et al. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)).

In *Burford*, the Court was asked to determine the "reasonableness" of an order issued by the Texas Railroad Commission granting "a permit to drill four oil wells in a small plot of land in the East Texas oil field." 319 U.S. 315, 317 (1943). Texas previously granted the Railroad Commission exclusive regulatory authority over the oil industry for the conservation of oil and gas because of the need for uniform regulation. *Id.* at 318. Texas also placed the authority to review the Commission's orders in a single set of state courts, the Travis County Court, "[t]o prevent the confusion of multiple review," and to permit an experienced group of state judges to obtain "specialized knowledge" in the field. *Id.* at 326-27. The Court ultimately found that

abstention applied because the availability of an alternative federal forum threatened to frustrate the purpose of the complex administrative system that Texas had established. *Id.* at 332.

The Court further clarified the application of the *Burford* abstention doctrine in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), where it addressed whether the doctrine applied in actions for damages. The California Insurance Commissioner, a trustee for insolvent reinsureds, brought an action in state court to recover reinsurance proceeds under tort and contract theories. The *Quackenbush* Court was asked to determine whether federal courts have the power to dismiss or remand cases for abstention only when the relief being sought is equitable or otherwise discretionary, or whether they can do so in a common-law action for damages. The Court held:

> Under our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine.

Quackenbush, 517 U.S. at 731.

This is precisely the case here, where Minvielle has filed a "Petition for Damages." It does not seek any discretionary or equitable relief. Although Minvielle

attempts to style its claims as "substantially equitable and discretionary in nature," Minvielle's petition seeks damages. Act 312, La. Rev. Stat. Ann. § 30:29, does not change the fact that this is a damages suit, as Minvielle claims, but rather merely sets forth a plan for the allotment of funds arising from damages. *See Brownell Land Co., LLC v. OXY USA Inc.*, 538 F.Supp.2d 954, 959 (E.D. La. 2007) (holding that the purpose of Act 312 is to ensure that the damages awarded are actually used to remediate the property at issue). Accordingly, the *Burford* abstention doctrine is inapplicable here.

Further, Minvielle's counsel has already raised and lost the argument that a federal court should abstain due to Act 312 in two Eastern District of Louisiana cases. *See Brownell Land Co., LLC v. OXY USA Inc.*, 538 F.Supp.2d 954, 959 (E.D. La. 2007); *C.S. Gaidry, Inc. v. Union Oil of Cal.*, No. 09-2762 2009 WL 2765814 (E.D. La. 8/27/2009). Both courts held that Act 312 did not provide adequate basis for a *Burford* abstention. The *Brownell* Court, in refusing to abstain, held that it was "not asked to weigh competing interests" and had "no discretion to award damages or not, if the jury finds that the land is contaminated." *Brownell*, 538 F.Supp.2d at 959. The *Gaidry* Court also refused to apply the *Burford* abstention doctrine, holding:

> There has been no showing that an adjudication of this case would present difficult questions of state law. The allegations made in the complaint are in significant part those of negligence, nuisance, and breach of mineral lease. The Court does not see why the state law surrounding these claims is difficult.

> Furthermore, federal jurisdiction in this case will not disrupt state efforts to establish a coherent policy of substantial public concern. Neither party to this case asks the Court to make a decision that would overturn an existing State administrative determination. *See, e.g., Burford*, 319 U.S. at 316-17 (reviewing challenge brought in federal district court to order of Texas Railroad Commission).

Gaidry, 2009 WL 2765814, at *6.[4] As such, Minvielle has failed to show how the refusal to apply the *Burford* abstention doctrine presents an issue worthy of this Court's discretionary review.

[4] Minvielle also claims that abstention is required in order to avoid the potential of conflicting adjudication. However, "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River*, 424 U.S. at 813-814. Moreover, the District Court is bound to follow the substantive law of the state, and even its procedural law, when it affects substantive rights. *Brownell*, 538 F.Supp 2d at 959, *citing Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding that the District Court may enforce state procedural requirements such as the Act, thus mitigating concerns about whether the Act can be properly enforced by a federal court after removal).

CONCLUSION

It is clear the Petition raises no compelling reasons for granting Certiorari. At best, it merely raises arguments based on Petitioner's disagreement with key facts found below. This Court should decline to review this case and should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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